

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.1012 of 2006

Dagadabai Baban Adak

Appellant

Vs.

Madhukar Baban Gawali & ors.

Respondents

Mr.Venkatesh Shastry for appellant.

Mr.V.G.Mujumdar for respondent no.1.

Ms.Vinita V. Shastry for resp.nos.2 to 6.

CORAM: B.H.MARLAPALLE,J.

March 26, 2007.

P.C.

. Heard Mr. Shastry, the learned counsel for the appellant - original plaintiff. Mr. Mujumdar appears for the respondent no.1 - original defendant. The plaintiff had filed R.C.S. No.134 of 2001 and impleaded the present respondent no.1 as the defendant no.1. Defendant nos.2 to 6 were the sons and daughters of the plaintiff. The said suit was filed for recovery of vacant possession of the suit property viz. CTS No.526 admeasuring 708.4 sq. mete of village Karade, Tal. Shirur, Dist. Pune and for mandatory injunction for removing the construction made by the defendant on the suit property along with mesne profits from the date of the suit till actual possession from the defendant no.1. The defendant no.1 filed the Written Statement on or about 21/8/1998 and stated at the first instance that the

plaintiff's late husband had sold the suit property to him in the year 1968 for a total consideration of Rs.5000/- but there was no sale deed. He further submitted that from the year 1970 onwards his ownership in respect of the suit property has been proved. He has constructed the house which he has been occupying and this was to the knowledge of the plaintiff. He, therefore, in the alternative claimed that he had become owner of the suit property by adverse possession as he was in possession of the suit property for more than 12 years continuously.

. On appreciation of evidence both the Courts below have discarded the defendant's claim that he had purchased the suit property from the plaintiff's late husband as there was no documentary proof in support of the sale transaction. However, the lower appellate Court did not agree with the trial Court on the issue of adverse possession and it held that the defendant proved his case for adverse possession and consequently the suit filed by the plaintiff came to be dismissed and the decree of the trial Court was reversed.

. The lower Appellate Court noted that in her

depositions at Exhibit 23 the plaintiff had admitted that she was residing at a distance of about 400 to 500 ft. away from the suit property and the defendant had constructed his house twenty years back. The city survey was undertaken in the year 1979 and at that time the property was recorded in the name of the defendant no.1. Though she claims that she had filed complaint with City Survey Officer, nothing was brought on record and in any case from 1979 till 2001 i.e. for about 22 years the plaintiff did not take any steps to challenge the possession of the defendant no.1 over the suit property or to get the City Survey record corrected. The fact remains that from 1970 onwards the defendant no.1 remained in possession of the suit property which was recorded in his name sometimes in the year 1979 and when the suit was filed he was occupying the house standing in the suit property for more than twenty years. The lower Appellate Court, therefore, held that the defendant no.1 had become owner of the suit property by adverse possession and, therefore, the reliefs prayed for in the suit and as granted by the trial Court could not be granted in favour of the plaintiff. It was never the case of the plaintiff that the defendant was a tenant or licensee of the

suit property.

. Mr. Shastry, the learned counsel for the first time in this Second Appeal during his oral arguments raised a totally new issue viz. that in respect of the Government property given on rent, there could be no question of ownership by adverse possession. It is required to be noted that in the Written Statement filed by the defendant when a specific plea is raised by way of alternative submissions that the defendant had become the owner by adverse possession, the plaintiff did not take any steps to amend her plaint or to frame an issue as has been raised by Mr. Shastry for the first time. Mr. Shastry also referred to the provisions of Section 103 of C.P.C. and submitted that even if such an issue could not be raised, it could be considered by this Court. There could be no doubt that if the parties before the trial Court had adduced evidence and if the same was on record, such an issue could have been considered in this Second Appeal as well. However, when the issues were framed and finalised by the trial Court, the plaintiff did not take any steps for framing such an issue and even before the lower Appellate Court no such steps were taken either to amend the plaint or to apply for framing the issue which is sought to be

agitated in this Second Appeal during the oral arguments. In my considered opinion the issue sought to be agitated for the first time cannot be considered unless the parties are allowed to lead evidence and the Collector concerned is also impleaded as a party so that either he adduces the evidence or the respective parties take steps to apply to the trial Court to bring the evidence on record through the Collector. Hence the issue raised by Mr. Shastry for the first time cannot be considered and framed as a substantial question of law.

. The issue of adverse possession and thereby the issue of ownership of defendant no.1 in respect of the suit property is based on the oral and documentary evidence of the respective parties and, therefore, there does not arise any substantial question of law for consideration of this Court in that regard. Hence this Second Appeal must fail at the threshold and the same is hereby dismissed in limine.

(B.H